Duquesne Law Review

Volume 23 | Number 2 Article 4

1985

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Volume 23 Winter 1985 Number 2

Articles

The Jurisdictional Reach of a Federal Court Hearing a Federal Cause of Action: A Path Through the Maze

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To what extent may a federal court hearing a federal cause of action assert jurisdiction over a nonresident defendant? The answer to that very basic question is anything but clear and simple. Concepts of jurisdiction and venue often become blurred;[1] congressional grants of jurisdiction and procedural modes of service sometimes seem at odds.[2] The procedural rules regulating the manner of service can themselves generate confusion between exclusively federal methods of service and those state methods which may (or may not) be used in federal causes of action.[3] Indeed, there is some question as to which modes of service, admittedly applicable to federal causes of action, may be used to effect extraterritorial service.[4] Ultimately, there is the constitutional inhibition on jurisdiction over nonresidents: due process.[5] What's a poor lawyer (or judge) to do? I wish I could say that the answers had come to me

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1. *See infra* text accompanying note 38 & note 39.
2. *See infra* text accompanying notes 11-12.
3. *See infra* text accompanying note 21 & note 22.
4. *See* text accompanying notes 17-56.
5. "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

in a startling revelation (perhaps the product of divine intervention) akin to a bolt of lightning on a pitch-black night. They did not. Apparently, that dramatic form of manifestation remains reserved for Gary Cooper portraying a Sergeant York. I have stumbled and tripped and fallen and arisen and stumbled again trying to get through the maze. Finally, aided in part by recent congressional amendments to the Federal Rules of Civil Procedure[6] and in part by a recently enacted jurisdictional statute,[7] I have arrived at

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6. FED. R. CIV. P. 4(c)(2)(C)(i) and (ii); 4(f).

7. Federal Courts Improvement Act, 28 U.S.C.A. § 1631 (West Supp. 1983):

> Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action . . . to any other court in which the action . . . could have been brought at the time it was filed . . . and the action . . . shall proceed as if it had been filed in . . . the court to which it is transferred on the date upon which it was actually filed in . . . the court from which it is transferred.

Id. The language of the statute would seem to be broad enough to encompass either a want of personal jurisdiction or a want of subject matter jurisdiction. There is language in the legislative history, however, that implies that the act may have been intended to apply only to a want of subject matter jurisdiction:

> Because of the complexity of the Federal court system and of special jurisdictional provisions, a civil case may on occasion be mistakenly filed in a court—either trial or appellate—that does not have jurisdiction. By the time the error is discovered, the statute of limitations or a filing period may have expired. Moreover, additional expense is occasioned by having to file the case anew in the proper court.
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> [This section] . . . would authorize the court in which a case is improperly filed to transfer it to a court where *subject matter jurisdiction* is proper. The case would be treated by the transferee court as though it had been initially filed there on the date on which it was filed in the transferor court. The plaintiff will not have to pay any additional filing fees. This provision is broadly drafted to allow transfer between any two Federal courts. Although most problems of misfiling have occurred in the district and circuit courts, others have occurred in the Court of International Trade and the Temporary Emergency Court of Appeals. Some others may occur in the Court of Appeals for the Federal Circuit. The broadly drafted provision of [this section] will help avoid all of these situations.

S. Rep. No. 97-180, 97th Cong., 2d Sess. 30 (1982), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 40 (italics added).

The italicized phrase seems somewhat ambiguous. Does it mean that the statute applies only to a want of subject matter jurisdiction? Or does the statute apply to a want of either personal or subject matter jurisdiction, with the italicized phrase being an admonition to the transferor court to assure that any intended transferee court be one which would have subject matter jurisdiction? If the latter interpretation is correct, the statute serves as rather direct and persuasive evidence that Congress is not significantly offended by the bringing of an action in a court which lacks personal jurisdiction over the defendant; transfer rather than dismissal is hardly the prescription to deal with a serious affront to congressional authority. If the former interpretation is intended, the statute still serves as some evidence that Congress would not be significantly offended by the bringing of an action in a court lacking personal jurisdiction over the defendant. After all, a want of personal jurisdiction is waivable by the defendant; a want of subject matter jurisdiction cannot be waived by either or both parties. If transfer rather than dismissal is the preferred congressional reaction to a want of subject matter jurisdiction, it seems unlikely that Congress would insist on dismissal

certain conclusions which may be of assistance to the reader and which may suggest resolutions of some of the more difficult problems. At the very least, the conclusions point toward a logical symmetry in determining the jurisdictional reach available to a federal court hearing a federal cause of action.

There seems to be a consensus that, had it wished, Congress could have explicitly given federal courts hearing all federal causes of action nationwide jurisdiction.[8] It didn't. Instead, Congress has explicitly afforded nationwide jurisdiction only sparingly;[9] in gen-

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given a want of personal jurisdiction only. Both the statute and the Senate Report seem aimed at securing a prompt judicial resolution of the merits of the case.

8. *See, e.g.*, Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 442 (1946) ("Congress could provide for service of process anywhere in the United States."). *See also* Gilbert v. Bagley, 492 F.Supp. 714 (M.D.N.C. 1980):

> Rule 4(f) . . . recognizes the power of Congress to provide for nationwide service of process to enforce a federal right. Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 . . . (1946). Congress' authority rests upon the fundamental right of a sovereign to exercise jurisdiction over any defendant within its territory.

Id. at 746.

See also Barrett, *Venue and Service of Process in the Federal Courts - Suggestions for Reform*, 7 VAND. L. REV. 608 (1954):

> In prescribing the rules governing the place of trial of actions commenced in the federal district courts, Congress might reasonably have been expected to follow one of two courses. On the one hand, it might have treated the continental United States as a single jurisdiction. On this basis service of process would have been permitted throughout the United States, venue rules would have been designated to channel litigation into the most convenient district, and provisions would have been made for a motion for change of venue to be granted whenever the suit was commenced in a district which did not have venue. On the other hand, Congress might have treated the individual federal districts as independent states. On this basis service of process would have been restricted to the district in which suit was brought, but venue of transitory actions would have been made proper in any district in which the defendant could be found for service of process. In fact, of course, Congress . . . adopted neither of these alternatives. Instead, it . . . limited venue to the residence of all the defendants or, in diversity cases, all the plaintiffs while at the same time confining service of process to the boundaries of the state in which the district court is located.

Id. at 608. Of course, Professor Barrett's description of the path selected by Congress reflects the date of his excellent article.

See also United States v. Hill, 694 F.2d 258, 261 (D.C. Cir. 1982) (citations omitted) ("Congress, of course, could authorize suits under federal law in any inferior federal tribunal . . . and provide that the process of every district court shall run into every part of the United States . . . .").

9. *See, e.g.*, 28 U.S.C. § 2361 (1976):

> In any civil action of interpleader or in the nature of interpleader . . . a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order . . . shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

eral, no such explicit jurisdictional reach has been granted. There also seems to be a consensus that the jurisdictional reach of a federal court hearing a federal cause of action can go no further than Congress provides.[10] Consequently, the problem of jurisdiction over a defendant not residing within the state in which the federal court sits would arise only in those actions in which Congress has in some manner authorized some degree of extraterritorial jurisdiction.

Let's begin by assuming, then, that Congress has afforded some extraterritorial jurisdiction as to a given federal cause of action. How is service of process to be effected? If the jurisdictional statute sets forth the mode of service to be utilized, of course that manner of service may be used.[11] If the jurisdictional statute does not prescribe a method of service, recourse may be had to the Federal Rules of Civil Procedure.[12]

Rule 4(d)(1) provides that service may be made on a competent adult

> by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.[13]

Service on "a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit

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> Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

Id.

10. *See* United States v. Hill, 694 F.2d 258 (D.C. Cir. 1982):

> [W]here Congress has not [provided that the process of every district shall run into every part of the United States], Rule 4(f) of the Federal Rules of Civil Procedure normally confines the geographical area in which a court's process can be served to "the territorial limits of the state in which the district court is held," FED. R. CIV. P. 4(f); service outside the state is permitted only "when authorized by a statute of the United States" or by some other specific provision of the Federal Rules, *id.; see Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-46 . . . (1946).

Id. at 261.

11. "Whenever a statute of the United States or an order of court thereunder provides for service of a summons . . . upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order . . . ." FED. R. CIV. P. 4(e).

12. The Federal Rules provide that "if there is no provision [in the statute or order of court thereunder] prescribing the manner of service, [service may be made] in a manner stated in this rule." FED. R. CIV. P. 4(e).

13. FED. R. CIV. P. 4(d)(1).

under a common name"[14] may, according to 4(d)(3), be effected

> by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute requires, by also mailing a copy to the defendant.[15]

Moreover, if the defendant is a competent adult or one of the other suable entities named above, recently enacted 4(c)(2)(C) provides that service may be effected

> (i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the court of general jurisdiction of that state, or (ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgement . . . and a return envelope, postage prepaid, addressed to the sender. If no acknowledgement of service . . . is received within 20 days after the date of mailing, service of such summons and complaint shall be made [by any person who is not a party and is not less than 18 years of age, or by a United States marshal or deputy United States marshal, or by a person specially appointed by the Court for that purpose.][16]

Well, all of that certainly seems accommodating enough. One could hardly wish for a broader selection of modes of service. As for who is to carry out the mechanics of effecting service, one could not imagine a more encompassing selection than (1) any person designated by the law of the forum state, (2) plaintiff or plaintiff's counsel, if mail service is utilized, or (3) any adult nonparty, a United States marshal or deputy marshal, or anyone appointed by the court. The class of persons who may effect service seems to be at least as broad as the modes of service available. Talk about accommodating. Why, all the plaintiff has to do is have someone in that broad class effect service on the defendant in any of the several methods available. What could be easier? And what's the problem?

Well, the first problem is *where* may such service be effected? Do the rules set forth above apply to service of process effected outside the forum state as well as within? Or do the rules set forth above—4(d)(1), 4(d)(3), and 4(c)(2)(C)—simply define the mechanics and those competent to effect the mechanics of service within the state in which the federal court sits? The headings of

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14. FED. R. CIV. P. 4(d)(3).

15. *Id.*

16. FED. R. CIV. P. 4(c)(2)(C)(i) & (ii). The bracketed language in the text is incorporated in the rule by reference to FED. R. CIV. P. 4(c)(2)(A) & (B).

Rule 4(e)[17]—Summons: Service Upon Party Not Inhabitant of or Found Within State—and Rule 4(f)[18]—Territorial Limits of Effective Service—would suggest the latter conclusion, that is, that the preceding rules describe the *who* and *what* for domestic service and that 4(e) and (f) prescribe the modes of extraterritorial service available. Rule 4(e) provides that

> [w]henever a statute of the United States or an order of court thereunder provides for a service of summons . . . upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule.[19]

In addition, 4(e) provides that

> [w]henever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons . . . upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may be made under the circumstances and in the manner prescribed in the statute or rule.[20]

One might infer from the language of 4(e), as well as its heading, that it, and not the preceding rules, is intended to govern extraterritorial service. And 4(e) is complemented by 4(f), which provides that

> [a]ll process . . . may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state.[21]

That language, too, might imply that 4(e) and (f) are intended to regulate extraterritorial service, and that the preceding rules govern domestic service only. To the extent that any consensus on the point exists, it would seem to be one accepting those inferences.[22]

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17. FED. R. CIV. P. 4(e).
18. FED. R. CIV. P. 4(f).
19. FED. R. CIV. P. 4(e).
20. FED. R. CIV. P. 4(e)(1) & (2).
21. FED. R. CIV. P. 4(f).
22. *See, e.g.*, United States v. Hill, 694 F.2d 258, 261 (D.C. Cir. 1982):

> Congress, of course, could authorize suits under federal law in any inferior federal tribunal . . . . But where Congress has not done so, rule 4(f) of the Federal Rules of Civil Procedure normally confines the geographical area in which a district court's process can be served to "the territorial limits of the state in which the district court is held," . . . ; service outside the state is permitted only "when authorized by a

It seems to me, however, that there are two significant obstacles to the acceptance of those inferences.

The first obstacle is the fact that 4(d)(7) (now repealed)[23] had long been used by federal courts as a basis for effecting extraterritorial service, notwithstanding the existence of 4(e) and (f).[24] That usage of 4(d)(7) occurred during a time when 4(e) authorized out-of-state service of a summons "[w]henever a statute of the United States or an order of court" so provided,[25] and 4(f) authorized service of process "beyond the territorial limits of [the state in which the district court is held]"[26] "when a statute of the United States so provide[d]."[27] That would suggest that 4(e) and (f) had not been intended to serve as the exclusive means of effecting extraterritorial service; apparently, the preceding rules, when applicable, could be used for that purpose. A similar conclusion as to recently enacted 4(c)(2)(C) is corroborated by the similarity of language between repealed 4(d)(7) and 4(c)(2)(C)(i). The former authorized service on competent adults and other suable entities in the manner prescribed by "the law of the state in which the district court is held for the service of summons or other like process upon . . . such defendant in an action brought in the courts of general jurisdiction of that state."[28] Precisely the same language appears in 4(c)(2)(C)(i).[29] Since former 4(d)(7) was available for effecting extraterritorial service, as well as 4(e) and (f), current 4(c)(2)(C)(i) would seem to be likewise available along with 4(e) and (f). More-

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statute of the United States" or by some other specific provision of the Federal Rules . . . .

Id. *See also* Davis v. Musler, 713 F.2d 907, 914-15 (2d Cir. 1983):

> When read in light of Rule 4(f), it is clear that Rule 4(d)(1) applies only when a complaint is served within the territorial limits of the state in which the district court where the action is pending sits . . . . Rule 4(e), which is reinforced by Rule 4(f), requires that service be made "under the circumstances and in the manner prescribed" by the law of the state in which the forum is located.

Id. *See also* F.T.C. v. Browning, 435 F.2d 96, 98 (D.C. Cir. 1970):

> Rule 4(f) of the Federal Rules of Civil Procedure normally limits the geographical area where a district court's process can be served to the territorial limits of the state in which the district court sits, except that extraterritorial service of process is proper "when authorized by a statute of the United States."

Id.

23. FED. R. CIV. P. 4(d)(7) (West 1960).

24. *See, e.g.*, First Flight Co. v. National Carloading Corp., 209 F. Supp. 730, 735 (E.D. Tenn. 1962); Maney v. Ratcliff, 399 F. Supp. 760, 767 (E.D. Wis. 1975).

25. FED. R. CIV. P. 4(e) (West 1960).

26. FED. R. CIV. P. 4(f) (West 1960).

27. *Id.*

28. FED. R. CIV. P. 4(d)(7) (West 1960).

29. *See* note 16 and accompanying text.

over, since 4(c)(2)(C) encompasses both subsections (i) and (ii), joined by the disjunctive *or*,[30] if (i) is available for extraterritorial service, so too should (ii) be likewise available.[31] It would be extraordinarily awkward draftsmanship to have (i) so available and (ii) not so available when the two subsections are separated only by a disjunctive *or*. And the modes of service set forth in (ii) would, in fact, be as efficient extraterritorially as domestically, and as efficient extraterritorially as the mode set forth in (i).

The second obstacle exists in the language of 4(f) itself. As has been demonstrated, 4(f) provides for service of process beyond the territorial limits of the forum state "when authorized by a statute of the United States *or by these rules.*" That italicized language strongly implies an intention to incorporate at least the totality of Rule 4. That italicized language can hardly have been the product of inadvertence. Since it did not exist in the earlier version of 4(f),[32] it must have been added knowingly and purposefully. Apparently, then, 4(e) and (f) are complementary to, and not intended to exclude, the preceding sections of Rule 4 with regard to service on a nonresident defendant.

The italicized portion of 4(f) generates another implication. Rule 4(e) authorizes extraterritorial service "[w]henever a statute of the United States or an order of court *thereunder* [so] provides." In those circumstances, "service may be made . . . in the manner prescribed by statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule." That language seems to assert that a condition precedent to such extraterritorial service is a federal statute so providing. Yet, 4(f) provides for extraterritorial process "when authorized by a statute of the United States *or by these rules.*" This seems to indicate that service beyond the limits of the forum state may be authorized by either of two sources: a federal statute *or* the Rules of Civil Procedure. How should that apparent inconsistency between 4(e) and its

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30. *Id.*

31. In Billy v. Ashland Oil Inc., No. 84-30 (W.D. Pa. filed June 13, 1984), a diversity case, the court found that FED. R. CIV. P. 4(c)(2)(C)(ii) was available to effect service on a nonresident defendant. It would seem, therefore, that a fortiori the Rule should be available to effect service on a nonresident defendant in a federal cause of action. In *Billy*, the court held that, where the nonresident did not return an acknowledgment of service, plaintiff was required to effect personal service in one of the methods set forth in 4(c)(2)(C)(ii), *see supra* note 16 and accompanying text, and could not resort, instead, to 4(c)(2)(C)(i). The court noted, however, that "the clear intent of Rule 4 is that notice and acknowledgment shall be returned." *Billy* at 1.

32. FED. R. CIV. P. 4(f) (West 1960).

requirement of a jurisdictional statute and 4(f) and its disjunctive requirements of jurisdictional statute or procedural rule be reconciled?

The language of 4(e) does provide an alternative to an "enabling" federal statute: "a statute or rule of court of the state in which the district court is held." Thus, 4(e) requires, as a condition precedent to extraterritorial service, either a federal "enabling" statute or a state "enabling" statute or rule. Once that is recognized, the apparent inconsistency between 4(e) and 4(f) tends to be converted into a desire on the part of the drafters to achieve symmetry. If 4(e) may be satisfied by federal statute or state statute or rule, 4(f) may be satisfied by federal statute or Federal Rule of Civil Procedure. After all, why should 4(e) give greater jurisdictional effect to a *state* statute or rule than 4(f) gives to *federal* rules, with regard to the availability of extraterritorial service in a *federal* court proceeding?

It could be argued, of course, that 4(e) authorizes the use of state statute or rule only with regard to diversity cases, and there is therefore a basis for denying a parallel effect with regard to 4(f)'s authorization of the use of federal rules. There is, however, a serious problem with that argument. There is respectable authority for the proposition that state long-arm statutes may be utilized to effect extraterritorial service in federal causes of action as well as in diversity cases.[33] Consequently, 4(e)'s authorization of state law or rule as the basis for service on a nonresident defendant should not be read as limited to diversity cases. Reading 4(e) as authorizing service pursuant to state law or rule in federal causes of action as well as in diversity cases avoids the anomaly of having federal courts hearing state-law claims enjoy a potentially greater jurisdictional reach than federal courts hearing federal causes of action. Avoiding that anomaly comports with an intuitive sense of propriety. Clearly, the use of state law or rule in effecting service will produce a mode of service which is, in fact, as efficient in federal causes of action as it is in diversity cases. Ultimately, then, there is an acceptable symmetry to 4(e) and (f). Each provides an alterna-

33. *See, e.g.*, Fisons Limited v. United States, 458 F.2d 1241, 1249 (7th Cir.), *cert. denied*, 405 U.S. 1041 (1972) (civil antitrust action); Swanson Painting Co. v. Painters Local Union No. 260, 391 F.2d 523, 524 (9th Cir. 1968) (Labor Management Relations Act suit); United States v. Montreal Trust Co., 358 F.2d 239, 240 (2d Cir.), *cert. denied*, 384 U.S. 919, *pet. for rehearing denied*, 384 U.S. 982 (1966) (action to recover income taxes); Maney v. Ratcliff, 399 F. Supp. 760, 767 (E.D. Wis. 1975) (§ 1983 action); Engineered Sports Products v. Brunswick Corp., 362 F. Supp. 722, 724 (D. Utah 1973) (patent infringement suit).

tive to an "enabling" federal statute as the condition precedent to extraterritorial service; 4(e)'s alternative is a state statute or rule, and 4(f)'s alternative is the Federal Rules of Civil Procedure.

But wait a minute. What about that conventional wisdom that the jurisdictional reach of a federal court hearing a federal cause of action can go no further than Congress provides? If 4(f) is read as authorizing the use of the totality of Rule 4 in effecting extraterritorial service, won't the resulting jurisdictional reach far exceed that granted by Congress? Not necessarily. After all, it was Congress that authorized the Supreme Court to promulgate procedural rules.[34] And such rules as are promulgated by the Court become effective only with the acquiescence of Congress, tacit where Congress takes no further affirmative action, express where Congress affirmatively asserts jurisdiction over proposed rules and, after consideration (and perhaps change, as was the case with the most

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34. *See* H.R. 7154, 97th Cong., 2d Sess. (1982):

> The Federal Rules of Civil Procedure set forth the procedures to be followed in civil actions and proceedings in United States district courts. These rules are usually amended by a process established by 28 U.S.C. 2072, often referred to as the "Rules Enabling Act." The Rules Enabling Act provides that the Supreme Court can propose new rules of "practice and procedure" and amendments to existing rules by transmitting them to Congress after the start of a regular session but not later than May 1. The rules and amendments so proposed take effect 90 days after transmittal unless legislation to the contrary is enacted.
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> On April 28, 1982, the Supreme Court transmitted to Congress several proposed amendments to the Federal Rules of Civil Procedure . . . . These amendments were to have taken effect on August 1, 1982.
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> The amendments to Rule 4 of the Federal Rules of Civil Procedure were intended primarily to relieve United States marshals of the burden of serving summonses and complaints in private civil actions. Appendix II, at 7 (Report of the Committee and Rules of Practice and Procedure), 16 (Advisory Committee Note). The Committee received numerous complaints that the changes not only failed to achieve that goal, but that in the process the changes saddled litigators with flawed mail service, deprived litigants of the use of effective local procedures for service, and created a time limit for service replete with ambiguities that could only be resolved by costly litigation. See House Report No. 97-662, at 2-4 (1982).
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> In order to consider these criticisms, Congress enacted Public Law 97-227, postponing the effective date of the proposed amendments to Rule 4 until October 1, 1983. Accordingly, in order to help shape the policy behind, and the form of, the proposed amendments, Congress must enact legislation before October 1, 1983.
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> With that deadline and purpose in mind, consultations were held with representative of the Judicial Conference, the Department of Justice, and others who had voiced concern about the proposed amendments. H.R. 7154 is the product of those consultations. The bill seeks to effectuate the policy of relieving the Marshals Service of the duty of routinely serving summonses and complaints. It provides a system of service by mail modeled upon a system found to be effective in California, and finally, it makes appropriate stylistic, grammatical, and other changes in Rule 4.

Id. Reprinted in 1982 U.S. CODE CONG. & AD. NEWS 4437-38.

recent amendments), enacts them.[35] Therefore, whatever jurisdictional significance may be attached to the federal rules is one in which Congress has acquiesced, tacitly or expressly. Indeed, the Supreme Court has said that "Congress could provide for service of process anywhere in the United States . . . . Congress, having omitted so to direct, the omission [in this case] was supplied by Rule 4(f) of the Rules of Civil Procedure."[36]

Well, if that's the case, why does Congress ever bother to enact an explicit jurisdictional statute? There may be a number of reasons. First, many of the jurisdictional statutes enacted by Congress go to subject matter jurisdiction, rather than, or in addition to, the existence vel non of jurisdiction over the person of the defendant.[37] Second, Congress, if dissatisfied with the jurisdictional reach afforded by the federal rules, could enact a statute extending or, conceivably, restricting the jurisdictional reach provided by the rules. Third, many of the so-called jurisdictional statutes enacted by Congress may be as much as or more concerned with broadening the venue which would otherwise be available under the general venue statutes, than extending the jurisdictional reach available.[38]

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35. *Id.*

36. Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 442-43 (1946).

37. On occasion, Congress may deal with subject matter jurisdiction, personal jurisdiction, and venue in one statutory scheme, as it did with the Federal Interpleader Act:

> The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person . . . having in his . . . custody or possession money or property of the value of $500 or more . . . if [t]wo or more adverse claimants, of diverse citizenship . . . are claiming or may claim to be entitled to such money or property . . . and if the plaintiff has deposited such money or property . . . into the registry of the court . . . .

28 U.S.C. § 1335(a)(1) & (2) (1976).

> In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants . . . . Such process shall be . . . served by the United States marshals for the respective districts where the claimants reside or may be found.

28 U.S.C. § 2361 (1976).

> Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside.

28 U.S.C. § 1397 (1976).

38. *See, e.g.*, Federal Employers Liability Act, 45 U.S.C. § 56 (1976); Jones Act, 46 U.S.C. § 688 (1976); patent infringement actions, 28 U.S.C. § 1400(f) (1976); Labor Management Relations Act, 29 U.S.C. § 185(C) (1976); Clayton Act, 15 U.S.C. § 22 (1976); Securities Act of 1933, 15 U.S.C. §77 v (a) (1976); Securities and Exchange Act of 1934, 15 U.S.C. § 78aa (1976). At times, the distinction between venue and jurisdiction is a blurred one. In Robertson v. Railroad Labor Board, 268 U.S. 619 (1925), the Court held that a congressional enactment authorizing the Board to seek enforcement of a subpoena before "any United States district court," *id.* at 620, went only to venue and not personal jurisdiction; conse-

We know that, even assuming the existence of subject matter jurisdiction and jurisdiction over the person of the defendant, the limitations of general venue statutes[39] may preclude the federal court selected by the plaintiff from exercising jurisdiction. It is that kind of limitation which often seems to preoccupy Congress in the enactment of "jurisdictional" statutes. The thrust of such statutes seems to be one directed towards ameliorating the stringent limitations of the general venue statutes.[40]

Congress, itself, has evidenced that "parallelism" as between jurisdiction and venue. Given a defect in venue, Congress has authorized the federal district courts to "dismiss, or if it be in the interests of justice, transfer such case to any district . . . in which it could have been brought."[41] More than twenty years ago, the Supreme Court held[42] that the statute authorized a federal district court hearing a federal cause of action against "a number of defendants,"[43] and finding that both venue *and personal jurisdiction* were lacking as to two of the defendants, to transfer the action to another federal district court where venue and jurisdiction did exist. In so ruling, the Court noted that

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quently, a federal district court in Illinois could not enforce a subpoena served in Ohio. In F.T.C. v. Browning, 435 F.2d 96 (D.C. Cir. 1970), the court held that a congressional enactment authorizing the F.T.C. to seek enforcement of a subpoena before "[a]ny of the district courts of the United States within the jurisdiction of which [an F.T.C.] inquiry is carried on," *id.* at 99, constituted a special grant of jurisdiction and not merely venue; consequently, a federal district court in the District of Columbia could enforce a subpoena served by mail in Pennsylvania. In United States v. Hill, 694 F.2d 258 (D.C. Cir. 1982), the court held that a congressional enactment authorizing the Department of Energy to seek enforcement of a subpoena in "[a]ny of the district courts of the United States within the jurisdiction of which [a DOE] inquiry is carried on," *id.* at 262, did "not confer on the District Court . . . the power of extraterritorial service of process." *Id.* at 266. Consequently, the district court in the District of Columbia could not enforce a subpoena served in Texas. That conclusion in *Hill* led the court, after rehearing, to reverse the earlier order of the court, United States v. Hill, 684 F.2d 1033 (D.C. Cir. 1982) (speaking order), which had affirmed the district court's enforcement order. United States v. Hill, 525 F. Supp. 621 (D.D.C. 1981).

39. "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the federal district where all defendants reside, or in which the claim arose, except as otherwise provided by law." 28 U.S.C. § 1391(b) (1976).

With regard to diversity jurisdiction, "[a] civil action wherein jurisdiction is founded solely on diversity of citizenship may, by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose." 28 U.S.C. § 1391(a) (1976).

40. *See supra* note 36.

41. "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a) (1976).

42. Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962).

43. 369 U.S. at 464.

> [t]he language of § 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction or not. The section is thus in accord with the general purpose which has prompted many of the procedural changes of the past few years—that of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits.[44]

More recently, Congress has provided that, given "a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action . . . to any other such court in which the action . . . could have been brought . . . ."[45] The parallel language used in the older venue statute and the more recent jurisdictional statute is apparent. In addition to evidencing a somewhat parallel congressional view of jurisdiction and venue, the newer statute seems to evidence a recent congressional recognition that, even absent an explicit or implicit grant of jurisdiction applicable in the original court, no grave injustice is done the defendant by transferring the action to a court where jurisdiction could have been achieved. That benign recognition by Congress would seem to corroborate the conclusion suggested above that congressional authority would not be seriously undermined by finding an implicit congressional approval of the means of acquiring jurisdiction set forth in the Rules of Civil Procedure. If transfer, rather than dismissal, is the congressionally preferred reaction to "a want of jurisdiction," Congress is hardly likely to be outraged by a judicial determination that the procedural means of acquiring jurisdiction have been tacitly or expressly approved by Congress.

Still, there is that judicial view that the Federal Rules of Civil

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44. *Id.* at 466-67. In the event of a 1406(a) transfer of a diversity case, the substantive law, including the conflicts law, of the state in which the *transferee* court sits is to be applied. Nelson v. International Paint Co., 716 F.2d 640, 643 (9th Cir. 1983). Given a transfer of a diversity case under 28 U.S.C. § 1404(a) (1976) ("[f]or the convenience of parties and witnesses, in the interest of justice"), the substantive law, including the conflicts law, of the state in which the *transferor* court sits is to be applied. Van Dusen v. Barrack, 376 U.S. 612 (1964). "In the [1404(a)] cases, we must apply the law of the transferor court to prevent parties from seeking a change in venue to take advantage of more favorable laws in another forum . . . . In [1406(a)] cases, however, it is necessary to look to the law of the transferee state, also to prevent forum shopping, and to deny plaintiffs choice-of-law advantages to which they would not have been entitled in the proper forum." Nelson v. International Paint Co., 716 F.2d 640, 643.

45. Federal Courts Improvement Act, 28 U.S.C. § 1631 (West Supp. 1983). For the full text of the statute, see *supra* note 7. "For cases transferred for lack of jurisdiction in the transferor court after October 1, 1982, 28 U.S.C. § 1631, provides that the action 'shall proceed as if it had been filed in . . . the court to which it is transferred . . . .' " Nelson v. International Paint Co., 716 F.2d 640, 643 n.3.

Procedure exist, not to *confer*, but only to *acquire*, jurisdiction. That view is perhaps most succinctly (and gracefully) stated in *Jim Fox Enterprises, Inc. v. Air France.*[46] There, Judge Brown wrote that "our decision [leaves] undisturbed Judge Friendly's universally-adopted decision in Arrowsmith v. United Press International . . . which holds that Rule 4(d)(3) is a means, a procedural method, for acquiring but not conferring jurisdiction."[47] Isn't that language at odds with our conclusion that personal jurisdiction may be conferred by Rule 4? Perhaps not. Both *Fox* and *Arrowsmith*[48] were diversity cases. In diversity cases, a sense of both the proprieties of federalism and the more stringent jurisdictional requirements of the due process clause of the fourteenth amendment, as compared with the fifth amendment,[49] suggests that the jurisdictional reach available should be determined by state rather than federal law. If the state imposes limitations on jurisdiction more restrictive than the Constitution requires, a federal diversity court ignoring those restrictions could be characterized as an "officious intermeddler." After all, in a state-law claim the state's decision as to the appropriate jurisdictional reach should be deemed paramount; the diversity court, an alternative forum available only because of the "accident" of diversity, should be deemed to have no inherent interest in securing a longer jurisdictional reach. Moreover, the limitations imposed by state law may reflect that state's view as to the constitutional restrictions required by the fourteenth amendment's due process clause. Even an "overly cautious" state view of those restrictions should not be ignored by a diversity court, since such a course could generate a constitutional issue which the state saw fit to avoid. But we are considering the jurisdictional reach available to a federal court hearing a federal cause of action. In those circumstances, the considerations of federalism and the restrictions of the fourteenth amendment, so critical in a diversity case, are simply irrelevant. The jurisdictional reach intended by Congress is a federal, not a state, concern, and the con-

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46. 705 F.2d 738 (5th Cir. 1983).

47. *Id.* at 741.

48. Arrowsmith v. United Press International, 320 F.2d 219 (2d Cir. 1963):

> There thus exists an overwhelming consensus that the amenability of a foreign corporation to suit in a federal court *in a diversity action* is determined in accordance with the law of the state where the court sits, with "federal law" entering the picture only for the purpose of deciding whether a state's assertion of jurisdiction contravenes a constitutional guarantee.

Id. at 223 (footnote omitted, italics added).

49. *See infra* text accompanying note 57.

stitutional limitation on that reach is the due process clause of the fifth, not the fourteenth, amendment. Consequently, I think the cautionary language of *Fox* and *Arrowsmith*, perfectly appropriate in diversity cases, is not applicable to this situation.

There is, however, *DeMelo v. Toche Marine, Inc.*[50] There, one of the questions noted by the Fifth Circuit was this: In a *federal* cause of action where Rule 4(d)(7)'s authorization of the use of a state long-arm statute to effect service is utilized, must Rule 4(e)'s requirement that such service be permissible under *state* law be satisfied? In attempting to resolve that narrow issue, the court found that "[u]nfortunately we are faced with an embarrassment of riches on this subject—our decisions are in conflict."[51]

> The two most recent Fifth Circuit cases on this point, decided only three days apart, give different answers. The second of these, [*Lapeyrouse v. Texaco, Inc.*,] issued on December 17 [,1982], held that a federal standard applies[.]
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> . . . .
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> Three days before *Lapeyrouse* was decided, another panel of our court had reached the opposite result in Burstein v. State Bar of California . . . . That panel . . . [concluded] that "a federal court, *even in a federal question case*, can use a state long-arm statute only to reach those parties whom a court of the state could also reach under it."[52]

Ultimately, *DeMelo* adopted the *Burstein*[53] conclusion.

I have no serious quarrel with the court's preference for *Burstein* over *Lapeyrouse*.[54] I think it should be noted, however, that, as to the defendant challenging in personam jurisdiction in *DeMelo*, only diversity jurisdiction existed.[55] Therefore, the court's conclusion may have been more dictum than decision. Still, my principal reaction is that a federal court hearing a federal cause of action today needn't concern itself with the narrow issue presented in *DeMelo* and the intra-circuit inconsistency over that issue. I believe that, given the most recent amendments to the Federal Rules

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50. 711 F.2d 1260 (5th Cir. 1983).

51. *Id.* at 1264.

52. *Id.* at 1265-66.

53. Burstein v. State Bar of California, 693 F.2d 511 (5th Cir. 1982).

54. Lapeyrouse v. Texaco, Inc., 693 F.2d 581 (5th Cir. 1982). The conflict between *Burstein* and *Lapeyrouse* and the *DeMelo* conclusion were noted and elaborated on in Handley v. Indiana & Michigan Electric Co., 732 F.2d 1265, 1269-70 (6th Cir. 1984).

55. "Because the basis of federal subject matter jurisdiction over Woolsey was not immediately apparent from the pleadings, we noticed that issue *sua sponte* and conclude that diversity jurisdiction is present. . . . Since the DeMelos did not attempt to cure this defect, they cannot now rely on maritime jurisdiction." DeMelo v. Toche Marine, Inc., 711 F.2d 1260, 1262 n.1 (5th Cir. 1983).

of Civil Procedure, it is possible that the plaintiff in a federal cause of action may use any of the modes of service set forth in the totality of Rule 4 to acquire jurisdiction over the nonresident defendant, and, therefore, if the state long-arm statute would be unavailable because of state law, plaintiff can avoid the problem by utilizing one of the other modes of service set forth in the Rule.

I believe that the recent jurisdictional statute enacted by Congress and the most recent congressional amendments to the Federal Rules of Civil Procedure suggest that now may indeed be the appropriate time for a judicial determination that Congress has acquiesced in the use of any of the modes of service set forth in Rule 4 for *conferring* jurisdiction over a nonresident defendant *and* for effecting extraterritorial service on that defendant in a federal cause of action. Such a determination would enormously facilitate the now difficult and complex task of defining the jurisdictional reach available to a federal court hearing a federal cause of action and would provide a resolution consistent with common sense and logic. Consequently, I am impelled toward these conclusions: A federal court hearing a federal cause of action may assert jurisdiction over a nonresident defendant in any manner provided by the Federal Rules of Civil Procedure, including the means of effecting service set forth in Rule 4, as well as in any manner explicitly provided by congressional statute. The federal court may, of course, be precluded from exercising that jurisdiction by venue limitations. In such a case, the court, on defendant's motion, must transfer or dismiss the action. Confronted with such a case, the court should transfer, rather than dismiss, where transfer would be "in the interest of justice," thus avoiding the delay and duplicative effort and cost that otherwise would be imposed on the plaintiff.

Those conclusions confront us with the ultimate limitation on the capacity of a federal court hearing a federal cause of action to assert jurisdiction over a nonresident defendant: due process.[56] Because we are concerned with the jurisdictional reach of a federal court hearing a federal cause of action, rather than that of a state or diversity court hearing a state-law claim, the due process limitation we must work with is that of the fifth, rather than the fourteenth, amendment. "While the limitations imposed in the Fifth Amendment are similar to those imposed upon the state court under the Fourteenth Amendment, they are not necessarily identi-

56. U.S. CONST. amend. V. For the applicable text of the fifth amendment, see *supra* note 5.

cal."[57] The "contours of amenability [to jurisdiction] are more fluid"[58] under the fifth, than under the fourteenth, amendment. There are at least a couple of reasons for that greater fluidity, both arising from the fact that a federal court hearing a federal cause of action is acting as the judicial arm of the United States.

Over the years, the Supreme Court has utilized,[59] interred,[60] disinterred,[61] reburied,[62] and resurrected[63] the "territorial sover-

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57. Lapeyrouse v. Texaco, Inc., 693 F.2d 581, 585 (5th Cir. 1982).

58. *Id.* In Handley v. Indiana & Michigan Electric Co., 732 F.2d 1265, 1271 (6th Cir. 1984), the court noted "that a Fifth Amendment analysis of due process is different from one undertaken under the Fourteenth Amendment. This is implicit in the Supreme Court's treatment of the Fourteenth Amendment analysis in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 . . . ." In Hogue v. Milodon Engineering, Inc., 736 F.2d 989, 991 (4th Cir. 1984), the court noted:

> The propriety of process issuing from federal courts sitting in cases arising under federal law is not tested by the same yardstick as is the constitutional limitation upon service of process issuing from state courts because the issues involved necessarily are often national in character . . . . Rather, the defendant must look primarily to federal venue requirements for protection from onerous litigation.

Id.

59. In Pennoyer v. Neff, 95 U.S. 714, 722 (1878) (citations omitted), the Court found that the due process clause was intended to preserve

> the authority of independent States, and the principles of public law . . . applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . . The other principle of public law . . . follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons and property without its territory.

Id.

60. In International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citations omitted), the Court seemed to lay to rest *Pennoyer's* concept of territorial sovereignty:

> Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer v. Neff* . . . . But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id.

61. In Hanson v. Denckla, 357 U.S. 235, 250-51 (1958) (citations omitted), the Court, after recognizing that

> [a]s technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer* . . . to the flexible standard of *International Shoe*[,]

proceeded to effect an awkward wedding of territorial sovereignty with minimum contacts:

> Those restrictions [on the personal jurisdiction of state courts] are more than a guar-

eignty" function of the due process clause of the fourteenth amendment. As most recently enunciated by the Court in *World-Wide Volkswagen*,[64] that territorial sovereignty function exists

> to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.
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> . . . .
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> [T]he Framers . . . intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.[65]

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antee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has the "minimum contacts" with that State that are a prerequisite to its exercise of power over him. See *International Shoe* . . . .

Id.

62. In Shaffer v. Heitner, 433 U.S. 186 (1977), the Court said:

> Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, [is] the central concern of the inquiry into personal jurisdiction.
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> . . . .
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> Nothing in Hanson v. Denckla . . . is to the contrary. The *Hanson* Court's statement that restrictions on state jurisdiction "are a consequence of territorial limitations on the power of the respective states," . . . simply makes the point that the States are defined by their geographical territory. After making this point, the Court in *Hanson* determined that the defendant over which personal jurisdiction was claimed had not committed any acts sufficiently connected to the State to justify jurisdiction under the *International Shoe* standard.

Id. at 204 & n.20 (footnote and citations omitted).

63. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). *See infra* text accompanying note 65.

64. *Id.*

65. *Id.* at 291-92, 293. Justice White, author of the Court's opinion in *World-Wide Volkswagen*, subsequently cast doubt on the significance of the territorial sovereignty function of the fourteenth amendment's due process clause. In Insurance Corp. of Ireland v. Compagnie de Bauxites de Guinee, 456 U.S. 694, 702 (1982), Justice White, writing for the Court, concluded that "[t]he personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." Justice White also noted that:

> It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-a-vis other states . . . . *World-Wide Volkswagen Corp. v. Woodson*
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> . . . .
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> The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest protected by the Due Process Clause. That clause is the only source of the personal jurisdiction requirement and the clause itself makes no mention of federalism

Rather clearly, the territorial sovereignty function has no role to play with regard to the due process clause of the fifth amendment. A federal court hearing a federal cause of action has no "coequal sovereigns." It is the exclusive forum provided for the cause of action asserted.[66] Consequently, while the "sovereignty of each State . . . [may] impl[y] a limitation on the sovereignty of all its sister States," the implication is simply irrelevant to the court representing the federal sovereignty.[67]

The second reason for that greater fluidity, like the first, grows out of the broader territorial sovereignty of the federal government. That broader territorial sovereignty implies a broader application of *International Shoe's*[68] minimum contacts test, and, as well, a broader application of the other tests suggested by *International Shoe.*

International Shoe suggests that the relationship between nonresident defendant and forum state may fall within one of three categories. First, nonresident defendant may have only occasional, isolated contacts with the forum state.[69] Second, nonresident defendant may conduct systematic, relatively continuous activities within the forum state.[70] And, finally, nonresident defendant may have a pervasive presence within the forum state.[71] *International Shoe* teaches that, where the first situation obtains, that is, where nonresident defendant has only minimum contacts with the forum,

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concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the power of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

Id. at 702-03 n.10.

For a more elaborate treatment of the peculiar course of the territorial sovereignty function of the due process clause in Court opinions, and a personal explanation for that course, see Seidelson, *Recasting World-Wide Volkswagen as a Source of Larger Jurisdictional Reach,* 19 TULSA L.J. 1, 5 (1983).

66. The Federal Employers' Liability Act is an exception to that rule, since the act provides for concurrent state or federal court jurisdiction. 45 U.S.C. § 56 (1972).

67. Obviously the second of these functions [limiting the jurisdiction of coequal sovereigns] applies only to actions in state courts and diversity actions in federal courts. When a federal court is hearing and deciding a federal question case there are no problems of "coequal sovereigns." That is a Fourteenth Amendment concern which is not present in actions founded on federal substantive Law.

Handley v. Indiana & Michigan Electric Co., 732 F.2d 1265, 1271 (6th Cir. 1984).

68. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

69. *Id.* at 316, 319.

70. *Id.* at 317.

71. *Id.* at 318. The classic example of such a pervasive presence may be found in Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 447-48 (1952).

due process requires that the cause of action asserted arise out of those minimum contacts.[72] At the other extreme, where nonresident defendant has a pervasive presence within the forum state, due process permits the court to assert jurisdiction over the defendant as to any cause of action, whether or not it arises out of defendant's in-forum activities.[73] But what about the middle category? Where nonresident defendant has significant contacts with the forum—contacts greater than minimal but less than a pervasive presence—in what circumstances may the forum assert jurisdiction over the defendant?

It has been stated that "where the [nonresident's] in-state activity was 'continuous and systematic' *and* that activity gave rise to the episode in suit, personal jurisdiction unquestionably could be asserted. . . . *International Shoe* itself ranked in that category."[74] That language indicates, quite correctly I believe, that significant contacts between nonresident defendant and forum state constituted simply an a fortiori instance of the minimum contacts test attributed to *International Shoe*: In either instance, the cause of action asserted had to arise out of those contacts.

More recently, however, in *World-Wide Volkswagen*, the Court concluded that

> [t]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being hailed into court there . . . . The Due Process Clause . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.[75]

With that language, the Court apparently concluded that a principal role of the due process clause was to protect nonresident defendants from jurisdictional surprise. That function of the due process clause has unique applicability to those situations in which nonresident has significant contacts with the forum. If such significant contacts exist as a result of defendant's "primary conduct," and such significant contacts make actions of a particular kind in the forum reasonably foreseeable, subjecting the defendant to jurisdic-

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72. 326 U.S. at 319.

73. *Id.* at 318.

74. Donahue v. Far Eastern Air Transport Corp., 652 F.2d 1032, 1036 (D.C. Cir. 1981) (emphasis in original).

75. 444 U.S. at 297.

tion in the forum with regard to actions of that kind would hardly come as a jurisdictional surprise, *whether or not* the specific action arose out of defendant's contacts with the forum.[76] Consequently,

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76. For an elaboration of that conclusion, see Seidelson, *supra* note 65, at 4.

I believe that corroboration for that significant contacts test may be found in Keeton v. Hustler Magazine, Inc., 104 S. Ct. 1473 (1984). Plaintiff, a New York resident, brought a libel action against defendant, an Ohio corporation with its principal place of business in California, in the federal court sitting in New Hampshire and exercising diversity jurisdiction. The New Hampshire long-arm statute authorized jurisdiction over foreign corporations "to the fullest extent permitted under [the due process clause of the fourteenth amendment to] the federal constitution." *Id.* at 1478 n.4. Plaintiff selected the New Hampshire forum because of that state's six-year statute of limitations, making "New Hampshire . . . the only State where [the] suit would not have been time-barred when it was filed." *Id.* at 1477. Finding that the defendant's "contacts with New Hampshire consist of the sale of some 10 to 15,000 copies of *Hustler* magazine in that State each month," the Court concluded that the assertion of jurisdiction over the defendant was not precluded by the due process clause. That assertion of jurisdiction was constitutionally permissible even though "[i]t [was] undoubtedly true that the bulk of the harm done to [plaintiff] occurred outside New Hampshire." *Id.* at 1481. Those circumstances suggest that (1) nonresident defendant's contacts with the forum state were not merely "random, isolated, or fortuitous," *id.* at 1478; rather, (2) those contacts were "continuous and systematic"; therefore, (3) while defendant's "activities in the forum may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities," *id.* at 1481, (4) they were "sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted, in part, in New Hampshire." *Id.* That suggests to me that, since defendant had generated significant contacts with the forum state, making libel actions against it in that state foreseeable, it would come as no jurisdictional surprise to the defendant to subject it to jurisdiction in the forum in this particular action, even though "the bulk of the harm done to [plaintiff] occurred outside New Hampshire." *Id.*

In Helicopteros Nacionales de Colombia v. Hall, 104 S. Ct. 1868 (1984), the Court found that the assertion of jurisdiction by a Texas state court over the Colombian defendant violated the due process clause of the fourteenth amendment. Justice Blackmun, writing for the Court, read the record as indicating that "[a]ll parties to the present case concede that [plaintiffs'] claims against [defendant] did not 'arise out of' and are not related to [defendant's] activities within Texas." *Id.* at 1872-73 (footnote omitted). That conclusion made it unnecessary for the majority to consider what "relationship between the cause of action and the [defendant's] contacts with the State of Texas" would have justified the assertion of jurisdiction. *Id.* at 1873 n.10. Justice Brennan, dissenting, read the record as negating any concession by the plaintiff "that their claims are not related to [defendant's] activities within the State of Texas." *Id.* at 1877 n.3. Justice Brennan, therefore, considered the "distinction between contacts that are 'related to' the underlying cause of action and contacts that 'give rise' to the underlying cause of action." *Id.* at 1878. He concluded that "there is a substantial difference between these two standards for asserting specific jurisdiction. Thus, although I agree that the [plaintiffs'] cause of action did not formally 'arise out of' specific activities initiated by [defendant] in the State of Texas, I believe that the wrongful death claim filed by the [plaintiffs] is significantly related to the undisputed contacts between [defendant] and the forum. On that basis, I would conclude that the Due Process Clause allows the Texas Courts to assert specific jurisdiction over this particular action." *Id.*

The defendant in *Hall* had negotiated a contract with a Texas consortium under the terms of which the defendant was to transport by helicopter personnel and equipment to an oil pipeline construction site in Peru. During such a flight, one of the defendant's helicopters crashed in Peru, causing the deaths of four employees of the consortium. Neither the dece-

World Wide Volkswagen would seem to create a jurisdictional distinction between minimum contacts and significant contacts. With the former, the cause of action asserted must arise out of nonresident defendant's contacts with the forum; with the latter, the cause of action need only be of the type made foreseeable by nonresident defendant's significant contacts with the forum. Thus, the due process clause of the fourteenth amendment operates differently in each of three categories. When nonresident defendant has only minimum contacts with the forum, due process requires that the cause of action arise out of those minimum contacts. When nonresident defendant has significant contacts with the forum, due process requires only that the cause of action asserted be of the type made foreseeable by those significant contacts. Where nonresident defendant has a pervasive presence within the forum, due process permits jurisdiction over the defendant as to any cause of action.

Now we must attempt to determine how those fourteenth amendment due process tests convert with regard to the fifth amendment. Here, by hypothesis, we are considering a federal court hearing a federal cause of action. In those circumstances, how should "the forum state" be read for due process purposes? I think the appropriate answer is "the United States."[77] After all, the sovereignty represented by the court is the United States. And

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dents nor their personal representatives were Texas domiciliaries, although all were United States citizens. In those circumstances, I would be inclined to conclude that the wrongful death actions had arisen out of defendant's forum activities; after all, the defendant's allegedly negligent performance arose out of the contract it had negotiated in Texas. Short of that, however, bearing in mind that the victims and their representatives were not Texas domiciliaries, I would be inclined to conclude that the defendant's having negotiated the contract in Texas made such causes of action against it in Texas foreseeable; therefore, the wrongful death actions in Texas should have come as no jurisdictional surprise to the defendant, notwithstanding the fact that the decedents had been domiciled in states other than Texas.

77. *Cf.* First Flight Co. v. National Carloading Corp., 209 F. Supp. 730, 736 (E.D. Tenn. 1962) (implying that jurisdiction in federal court is constitutionally permissible if defendant has minimum contacts with United States). In Weinberg v. Colonial Williamsburg, Inc., 215 F. Supp. 633, 638 n.3 (E.D.N.Y. 1963), the court said:

> A recent district court decision of interest has suggested that the minimum contacts required by International Shoe need only be with the United States as a whole in actions brought in the federal Courts. First Flight Co. v. National Carloading Co. . . . Counsel have not argued this point to the court and that decision is in no way binding upon this court. Were the court to consider that argument however it would reject it as erroneous.

Id. It should be noted that *Weinberg* was in federal court on diversity grounds; in *First Flight*, the plaintiff had asserted a federal cause of action. The jurisdictional reach considered in this text is that which exists in a federal court hearing a federal cause of action.

the cause of action asserted is one created by the Congress of the United States. If forum state is translated into United States, how will the due process tests read? Well, something like this: If defendant has only minimum contacts with the United States, due process requires that the federal cause of action asserted arise out of those minimum contacts. If defendant has significant contacts with the United States, due process requires only that the federal cause of action asserted be of the type made foreseeable by those significant contacts. And where defendant has a pervasive presence within the United States, due process permits jurisdiction over the defendant as to any federal cause of action.

Is there any problem with thus transcribing the due process clause of the fourteenth amendment into the due process clause of the fifth? It could be said that such a transcription might require a State *A* defendant to defend a federal cause of action in a federal district court sitting in distant State *B* when the operative facts had occurred in State *C*. But there are a few appropriate responses to that concern. This is a question of jurisdiction over the defendant. Such jurisdiction may be found to exist and yet be "unexercisable" if venue is inappropriate. Given the limitations of venue available to hear a federal cause of action, already noted, the likelihood of undue imposition on the defendant is diminished substantially. Beyond restrictions on venue, there is a 1404(a)[78] motion to transfer. Should defendant find himself unduly disadvantaged by litigation in the federal district court selected by plaintiff, defendant may seek transfer to any district court where the action could have been brought. The limitations on venue complemented by the availability of a 1404(a) motion to transfer should adequately ameliorate any concern over undue imposition on the defendant.[79]

An additional factor should be noted in the transcription from the fourteenth to the fifth amendment due process clause. In the traditional fourteenth amendment situation, the concern is directed toward a nonresident defendant. In the vast majority of fifth amendment cases, the defendant will be a resident of the sovereignty represented by the federal court and of the sovereignty

78. The United States Code provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1972).

79. In Hogue v. Milodon Engineering, Inc., 736 F.2d 989, 991 (4th Cir. 1984), the court, referring to the nonresident defendant in a federal cause of action, noted that "the defendant must look primarily to federal venue requirements for protection from onerous litigation." *Id.*

which created the federal cause of action, the United States. In those cases, it really isn't accurate to characterize the defendant as a nonresident for due process purposes. He may or may not reside within the judicial district of the federal court or of the state in which the federal court sits, but he remains a resident of the United States. He may or may not have acted within the judicial district of the federal court or the state in which the federal court sits, but he did act within the United States. He may or may not have been served within the judicial district of the federal court or the state in which the court sits, but he almost certainly will have been served within the United States. Where he resides within the United States and where he acted within the United States would seem to go more appropriately to the existence of venue or the propriety of a 1404(a) transfer than to the constitutional capacity of the federal court hearing the federal cause of action to assert jurisdiction over the United States resident. Where he was served would seem to lack constitutional significance so long as the mode of service utilized was one reasonably calculated to give the defendant actual notice of the proceeding and an opportunity to defend.[80] Any mode of service specifically authorized by Congress or provided for in the Federal Rules of Civil Procedure, including the totality of Rule 4, would seem virtually certain to satisfy those requirements.

These, then, are my ultimate conclusions. A federal court hearing a federal cause of action may acquire jurisdiction over the defendant in any manner explicitly provided for in a congressional statute or in any manner provided for in the Federal Rules of Civil Procedure, including all of Rule 4, implicitly approved by Congress. That conclusion would be simultaneously consistent with a logical sense of symmetry and the most recent congressional enactments dealing with the Federal Rules of Civil Procedure and jurisdiction. In the event of a defect in venue or "a want of jurisdiction," the federal court selected by the plaintiff should, if in the interest of justice, transfer the action to any federal court in which venue and jurisdiction would be appropriate. In such circumstances, the due process clause of the fifth amendment would not

80. "[The] adequacy [of substituted service] so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give . . . actual notice of the proceedings and an opportunity to be heard." Milliken v. Meyer, 311 U.S. 457, 463 (1940). I assume that that test for the adequacy of notice would be the same under the fifth amendment as under the fourteenth.

preclude the exercise of such jurisdiction so long as (1) the defendant had minimum contacts with the United States and the federal cause of action arose out of those contacts, or (2) the defendant had generated significant contacts with the United States and the federal cause of action was of the type foreseeable as a result of those contacts, whether or not the particular cause of action arose out of those contacts, or (3) the defendant had a pervasive presence within the United States. That application of the due process clause of the fifth amendment would provide ample assurance that a defendant in a federal cause of action would not be deprived of property without due process of law, would afford appropriate sensitivity to the federal interest inherent in a federal cause of action, and would complement the most recent congressional enactments dealing with extraterritorial jurisdiction. It would, as well, facilitate charting a rational path through what has been a jurisdictional maze.